IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2009, Session

JOHN MOSCHEO v. POLK COUNTY, TENNESSEE

Appeal from the Chancery Court for Polk County
No. 7356 Jerri S. Bryant, Chancellor

No. E2008-01969-COA-R3-CV - FILED SEPTEMBER 2, 2009

This appeal relates to another installment in the saga of the privilege tax on whitewater amusements in Polk County, Tennessee. The trial court granted summary judgment, finding, pursuant to 33 U.S.C. §5(b), that the Ocoee River is a navigable waterway subject to the authority of the United States and that the county's privilege tax is preempted by federal law and is, therefore, invalid. We affirm.

Tenn. R. App. P. 3; Judgment of the Chancery Court
Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which Herschel P. Franks, P.J., and D. MICHAEL SWINEY, J., joined.

Ginger Wilson Buchanan, Cleveland, Tennessee, for Appellant, Polk County, Tennessee.

Christopher W. Connor and Trey Jackson, Maryville, Tennessee, for Appellee, John Moscheo.

OPINION

I. BACKGROUND

This is a case involving a locally authorized privilege tax imposed by Polk County ("County"). Originally enacted in 1981 and amended several times thereafter by various acts, the local tax was reenacted and restated in 2001. The 2001 Private Act ("Private Act") imposes a tax at the rate of $2.50 "upon the privilege of a consumer participating in an amusement." In the recent case of *High Country Adventures, Inc. v. Polk County*, No. E2007-02678-COA-R3-CV, 2008 WL

4853105 (Tenn. Ct. App. E.S., Nov. 10, 2008)[1]("*High Country*"), this court summarized the history of the statute:

> In 1981, the Tennessee legislature enacted a private act ("the 1981 Act") authorizing Polk County to levy a privilege tax on consumers participating in activities that included commercial whitewater rafting excursions in Polk County. . . . [T]he 1981 Act included the following sections, beginning with Section 2, which stated:
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> > The legislative body of Polk County is hereby authorized to levy a privilege tax upon the privilege of a consumer paying consideration for admission for an amusement. Such tax shall be imposed on the consideration charged by the operator at a rate equivalent to the combined rate imposed by the state and Polk County under the "Retailers' Sales Tax Act" and the "1963 Local Option Revenue Act" pursuant to Tennessee Code Annotated, Title 67, Chapter 30, as the same may be amended and adopted. Such tax so imposed is a privilege tax upon the consumer enjoying the amusement and is to be collected and distributed as provided in this act.
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> The term "operator" as used in the 1981 Act was defined as ". . . the person operating an amusement," and the term "amusement" was further defined as follows:
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> > "amusement" means any ride, excursion, or float trip by canoe, raft, or similar floating device on a whitewater river where a fee is charged by any person for such ride, excursion, or float trip, which charge is otherwise not included as a taxable privilege under the "Retailers' Sales Tax Act" imposed by Tennessee Code Annotated, Title 67, Chapter 30. FN1
> >
> > FN 1. The Retailers' Sales Tax Act provides that activities such as the whitewater rafting in this case shall be exempt from taxation as an amusement as follows:
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> > There is exempt from the sales tax on admission, dues or fees imposed by §67-6-212: . . . Events or activities conducted upon rivers and waterways in this state whose continued use for recreational purposes is contingent upon revenue produced pursuant to agreements entered into between the State of Tennessee and the federal government, or an agency thereof, which agreements provide

[1] The plaintiff acknowledges that this appeal essentially raises the same issues as *High Country* – this matter was filed as a precautionary measure to insure a petitioner with standing was able to present all the issues for review. *High Country* involved whitewater rafting operators as plaintiffs, whereas this matter was filed by a consumer/taxpayer.

> for the establishment of a trust fund for such purposes; provided, that this exemption shall prevail only if the annual distribution of funds to the state from such trust fund exceeds that amount of revenue to the state that would otherwise be produced if the amusement tax under the provisions of § 67-6-212 were impose[d] on such events or activities, as determined by the fiscal review committee.
>
> Tenn. Code Ann. §67-6-330(a)(8).[2]

As to collection of the tax from the consumer and remittance of such taxes to Polk County, the 1981 Act further provided at Section 3 that "[s]uch tax shall be added by each operator to the consideration charged for admission for such amusement, and shall be collected by such operator from the consumer and remitted by such operator to the county trustee. The tax shall not be assumed by the operator."

Finally, Section 9 of the 1981 Act provided as follows with respect to remedies for recovery of allegedly erroneous tax payments:

> Upon any claim of illegal assessment and collection, the operator liable for collecting and remitting the tax shall have the remedy provided in Tennessee Code Annotated, Title 67, Chapter 23 for recovery of erroneous tax payments, it being the intent of this act that the provisions of law which apply to the recovery of taxes illegally assessed and collected shall apply to the tax collected under the authority of this act; provided, the county trustee shall possess those powers and duties provided in Tennessee Code Annotated, Section 67-2301, with respect to the adjustment and settlement with such operators of all errors of taxes collected by him under the authority of this act and direct the refunding of the same. Notice of any tax paid under protest shall be paid to the county trustee, and suit for recovery shall be brought against him.

Section 2 of the 1981 Act was amended in 1997 to delete the first sentence and substitute therefor: "The Legislative Body of Polk County is hereby authorized to

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[2] Tenn. Code Ann. §67-6-330(a)(8) exempts commercial whitewater rafting on waterways such as the Ocoee from the general state law taxing amusements as codified as Tenn. Code Ann. §67-6-212. In *Polk County, Tennessee v. Rogers*, 85 S.W.3d 781, 784-85 (Tenn. Ct. App. 2002), this court found that there was a reasonable basis for the special classification of whitewater rafting businesses in Polk County so as to make ticket sales by those businesses subject to privilege taxes under the Private Act. *Id.* at 785. In *Rogers*, we indicated the purpose of the Private Act was to alleviate the burden placed upon county services as a consequence of whitewater rafting activity on the Ocoee. *Id.* at 787.

levy a privilege tax upon the privilege of a consumer participating in an amusement for which an admission fee is charged."

In April of 2001, the legislature, again by private act, reenacted and restated the 1981 Act. This reenactment/restatement ("the 2001 Act") changed certain aspects of the 1981 Act. Of note, . . . Section 7 of the 2001 Act restated Section 9 of the 1981 Act, pertaining to remedies with respect to erroneous payments, as follows:

> Upon any claim of illegal assessment and collection, the operator liable for collecting and remitting the tax shall have the remedy provided in Tennessee Code Annotated, Title 67, Chapter 1, Part 9, for recovery of erroneous tax payments, it being the intent of this act that the provisions of law which apply to recovery of taxes illegally assessed and collected shall apply to the tax collected under the authority of this act; provided, the county trustee shall possess those powers and duties as provided in Tennessee Code Annotated, Section 67-1-707, with respect to the adjustment and settlement with such operators of all errors of taxes collected by him under the authority of this act and direct the refunding of the same. Notice of any tax paid under protest shall be paid to the county trustee, and suit for recovery shall be brought against him.

High Country, 2008 WL 4853105, at *1-2 (citing Tenn. Code Ann. §§67-1-1405 and 67-4-716).

In October 2007, John Moscheo ("Moscheo") participated in a rafting trip on the Ocoee River[3] conducted by Outland Expeditions, a commercial whitewater rafting company.[4] Subsequent

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[3] In *Ocoee River Council v. Tennessee Valley Auth..*, 540 F.Supp. 788 (E.D. Tenn. 1982), the following background is provided regarding the Ocoee River:

> The Ocoee is a tributary of the Hiwassee, which is itself a tributary of the Tennessee. The river originates in the Appalachians in Union County in north Georgia, where it is known as the Toccoa. It flows in a northwesterly fashion and enters Tennessee in its southeastern-most region, in Polk County, where its name changes to the Ocoee. The drainage area of the river above its confluence with the Hiwassee covers 639 square miles and includes land in Tennessee, Georgia and North Carolina. The first dam on the river, Ocoee No. 1, was constructed in 1911 by the Eastern Tennessee Power Company approximately 12 miles from the mouth of the river. Ocoee No. 2, at river mile 24.2, was completed in 1913, and the Blue Ridge, at river mile 53, was completed in 1930. The TVA [(Tennessee Valley Authority)] acquired these projects in 1939 and built an additional dam, Ocoee No. 3, in 1942 at river mile 29.2.
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> * * *
>
> [Ocoee No. 2] was shut down in September, 1976 . . . . As a result the Ocoee [was] allowed to run its natural course along the streambed. The river . . . provide[d] excellent whitewater recreational

(continued...)

to the rafting trip, Moscheo paid the $2.50 tax imposed by the Private Act under protest directly to Polk County. In January 2008, Moscheo filed suit against Polk County. In his complaint, he alleged the following:

> 6. The tax as levied is in violation of the Mari[time] Transportation Security Act of 2002 as codified in 33 U.S.C. §5(b) . . . .
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> 7. The Ocoee River is a navigable waterway, subject to the authority of the United States.
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> 8. Taxpayer was assessed the tax as a passenger on a vessel or watercraft on the Ocoee River.
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> 9. The tax levied upon Taxpayer does not meet any exception as outlined in 33 U.S.C. §5(b).

Moscheo subsequently filed a motion for summary judgment in which he asserted that there were no material facts in dispute – that the tax being levied against participants in rafting trips was in

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[3](...continued)
opportunities, including rafting, canoeing and kayaking. . . . [T]he scenic attributes of the Ocoee River Gorge, the proximity of the river to area population centers, and the direct accessibility via U.S. Highway 64, qualify the Ocoee as a premier whitewater recreation stream. . . .

Id. at 791. *United States ex rel. Tennessee Valley Auth.. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992 (6th Cir. 1983) relates additional history:

> TVA determined to reopen the Ocoee No. 2 project after completion of the repairs [in the flume line] without allowing for recreational releases of water into the riverbed between the dam and powerhouse. The decision was made after Congress rejected a requested appropriation to provide for the loss of revenue from electricity sales which would result from providing for 82 days of recreational release of water annually. . . .
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> After holding several public hearings TVA ratified its previous decision to rehabilitate the Ocoee No. 2 hydroelectric facility and directed that it be operated exclusively for power generation in the absence of some method for ensuring compensation for power losses associated with recreational releases. The general manager of TVA was granted authority to provide for approximately 82 days of recreational releases per year upon development of appropriate compensation arrangements, which were not limited to appropriations but could include concession, license or user fees or other sources of funding.

Id. at 994. In the instant case, the Mayor of Polk County notes in an affidavit that "a contractual relationship has existed between T.V.A. and other governmental entities which allows for the flow of water through the natural bed of the Ocoee River on certain days each year for the purpose of rafting recreation, commercial or otherwise."

[4]The Tennessee Valley Authority permits outfitters to operate commercial rafting businesses on the Ocoee River as it runs through Polk County.

contravention of § 445 the Maritime Transportation Security Act of 2002 ("MARSEC"),[5] which amended 33 U.S.C. §5(b) of the Rivers and Harbors Appropriations Act of 1884. The pertinent section provides as follows:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
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> (1) fees charged under section 2236[6] of this title;
> (2) reasonable fees charged on a fair and equitable basis that –
>
> > (A) are used solely to pay the cost of a service[7] to the vessel or water craft;
> > (B) enhance the safety and efficiency of interstate and foreign commerce; and
> > (C) do not impose more than a small burden on interstate or foreign commerce; or
>
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

In response, as relevant to this appeal, Polk County noted the following:

> 1. Since the determination by the U.S. Army Corp[s] of Engineers that the Ocoee River was a navigable waterway of the United States, such determination made in 1977, there have not been any locks constructed for navigation around Ocoee Dams 1, 2 and 3 on the river. . . .

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[5] Enacted shortly after the events of September 11, 2001, MARSEC is codified in scattered sections of Titles 14, 16, 33, and 46 of the United States Code. The general purpose of the Act is to provide increased security over facilities which, in the wake of September 11, 2001, were identified as terrorist targets. *Hyatt v. American Citadel Guard, Inc.*, No. 06-2316, 2007 WL 1169370, at *1 n.6 (W.D. La. April 19, 2007)(mem.). The legislation amended 33 U.S.C. §5(b), a miscellaneous provision.

[6] The Water Resources Development Act of 1986.

[7] For example, pilotage, *Cooley v. Bd. of Wardens*, 53 U.S. 299, 314 (1851); wharfage, *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U.S. 80, 87, 88 (1877); charges for the use of locks on a navigable river, *Huse v. Glover*, 119 U.S. 543, 549-50 (1886); fees for medical inspection, *Morgan's Louisiana & T.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 445, 463 (1886); and emergency services, *New Orleans Steamship Assoc. v. Plaquemines Port, Harbor & Terminal Dist.*, 690 F.Supp. 1515, 1524 (E.D. La. 1988).

2. There are not any forest products that are transported in commerce upon the Ocoee River. . . .

3. Downstream from Ocoee Dam No. 3 and Ocoee Dam No. 2, there are constructed pipelines or flume line through which the waters that normally flow in the Ocoee River are carried for the purpose of T.V.A. to generate electricity. At the time that water is flowing through the pipelines and flume line, there is not sufficient volume of water in the Ocoee River to allow rafting, canoeing, kayaking, or any other form of recreation in the riverbed where the commercial rafting amusements take place . . . .

4. By contract involving T.V.A. and other state and federal government entities, water is released from the normal flow through the pipelines and flume line into the Ocoee River bed in order that the rafting amusement businesses have enough volume of water to carry on their commercial operations. Absent the discharge of this water, there is not any water in the riverbed of the Ocoee River where the Ocoee rafting operations take place sufficient for there to be any navigation of the River by commercial cargo transport or recreation. . . .

* * *

Polk County further argued that there is not any express language in the federal statute preempting a non-federal tax or imposition already in effect, only a prescription against *prospective* local enactments. The County asserted that absent clearly expressed intent by Congress to preempt existing law, preemption should not be implied. The County submitted that genuine issues of material fact existed as to the issues of navigability and preemption.

The trial court entered an order granting summary judgment on August 8, 2008. Inter alia, the trial court found, pursuant to 33 U.S.C. §5(b), that the Ocoee River was a navigable waterway under the authority of the United States and that the tax assessed by Polk County was not used to pay the cost of service to a vessel. Consequently, the trial court held that the tax was preempted by the River and Harbors Appropriation Act of 1884, codified at 33 U.S.C. §5 (as amended by MARSEC). The trial court enjoined Polk County from imposing the tax in the future. The County filed a timely notice of appeal.

II. ISSUES

The issues presented for review have been restated as follows:

A. Whether 33 U.S.C. §5(b) under the Rivers and Harbors Appropriations Act 1884, as amended by the Maritime Transportation Security Act of 2002, provides a private right of action to an individual.

B. Whether the trial court erred in determining it had jurisdiction to determine navigability.

C. Whether the trial court erred in concluding that the Ocoee River is a "navigable water subject to the authority of the United States," as the Maritime Transportation Security Act of 2002 is inapplicable to the activities of commercial whitewater rafting conducted on the river.

D. Whether the trial court erred in determining §445 of the Maritime Transportation Security Act preempts the imposition by the County of a local privilege tax upon consumers participating in commercial whitewater rafting in Polk County.

III. STANDARD OF REVIEW

Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993).

In *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), the Tennessee Supreme Court clarified the moving party's burden of proof in a summary judgment motion. A moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Id.* at 5. According to the Court, when a party seeking summary judgment has made a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts, which must be resolved by the trier of fact. *Id.; see Byrd*, 847 S.W.2d at 215; *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to interrogatories, and admissions on file) to show that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

There is no presumption of correctness for summary judgments on appeal. *See Nelson v. Martin*, 958 S.W.2d 643, 646 (Tenn. 1997); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997). This court must view all of the evidence in the light most favorable to the non-movant and resolve all factual inferences in the non-movant's favor. *Luther v. Compton*, 5 S.W.3d

635, 639 (Tenn. 1999); *Muhlheim v. Knox County Bd. of Educ*., 2 S.W.3d 927, 929 (Tenn. 1999). When the undisputed facts, however, support only one conclusion, then the moving party is entitled to judgment as a matter of law and a summary judgment will be upheld. *See White v. Lawrence,* 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

IV. DISCUSSION

A.

Polk County first contends that Moscheo brought this suit under 33 U.S.C. §5(b) and asserts that the provision does not provide a private cause of action. While the only statutory citation in the complaint is to 33 U.S.C. §5(b), Moscheo claims he brought this action under Tenn. Code Ann. §67-1-904, which allows a taxpayer to challenge the legality of any tax sought to be collected by either the state or a municipality or political subdivision thereof. *See* Tenn. Code Ann. §67-1-901, et seq.

Pursuant to Tenn. Code Ann. §67-1-904, any suit for the recovery of taxes believed by the taxpayer to be either wrongfully collected or not due from the party to either the state and/or county "for any reason going to the merits of the tax" may be brought in "any court in the county of the taxpayer's residence or in the county of the location of the defendant having jurisdiction of the amount and parties. . . ." Tenn. Code Ann. §67-1-904. The Tennessee Supreme Court has held that concurrent jurisdiction to hear suits under Tenn. Code Ann. §67-1-904 rests in both the Circuit and Chancery Courts of the proper county. *See Tidwell v. Goodyear Tire & Rubber Co.*, 520 S.W.2d 721, 723-24 Tenn. 1975). Thus, the legislature has provided that a chancery court would have subject matter jurisdiction to hear any matter that goes to the merit of a tax "for any reason." Accordingly, the Polk County Chancery Court clearly had subject matter jurisdiction over all issues pertaining to an act of the Tennessee legislature.

Under Tenn. Code Ann. §67-1-903, the taxpayer must (1) pay the tax under protest and (2) file suit to recover the sum paid under protest within six months from making the payment. In the instant matter, Moscheo complied with these applicable requirements by first paying the tax under protest and then filing suit within a court of competent jurisdiction in order to recover the same.

Polk County appears to be correct when it argues that 33 U.S.C. §5(b) does not give a private cause of action. However, we find that Moscheo did not bring this suit under 33 U.S.C. §5(b). Rather, he asserted a state law cause of action as expressly provided under Tenn. Code Ann. §67-1-903. He does not seek reimbursement of the illegal assessed tax pursuant to 33 U.S.C. §5(b), rather, he seeks reimbursement under Tennessee law based upon the contention that the tax levied by Polk County is illegal pursuant to the federal statute. Accordingly, we hold that Moscheo was entitled to bring this suit.

B.

Polk County further contends that the trial court lacked subject matter jurisdiction to make decisions related to the navigability of a waterway.

33 C.F.R. §329.14, "Determination of navigability, provides as follows:

> (a) *Effect on determinations*. Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

Based on the cited regulation, the County contends that only a federal court has jurisdiction to make a conclusive determination of navigability. Thus, the County asserts that the trial court had no subject matter jurisdiction to decide the issue. While Moscheo concedes that 33 C.F.R. §329.14 sets forth that *conclusive* determinations of navigability can only be made by federal courts, he contends that Polk County fails to set forth any authority that would prohibit a state court, in the absence of a conclusive determination by a federal court, to interpret the federal statute. The record before us does not include any reference to a federal court determination that the Ocoee River is a navigable water of the United States. Moscheo further asserts that Polk County fails to submit any authority that would preclude a trial court from ruling that a particular waterway is navigable when presented with undisputed facts, as is the situation in the present matter, and that a determination of navigability had in fact been made by the administrative agency authorized to make such determinations.

33 C.F.R. §329.14 speaks to when "the courts" and "a judicial body" will utilize conclusions as to a water's navigability made by federal agencies, such as the United States Army Corps of Engineers. Absent specific congressional enactment to the contrary, state courts have inherent authority and concurrent jurisdiction with the federal courts to adjudicate claims arising under federal law pursuant to the doctrine of "dual sovereignty." State courts therefore have the authority to render binding decisions based on their interpretation of federal law unless a federal statute provides for exclusive federal jurisdiction. *ASARCO v. Kadish*, 490 U.S. 605, 617 (1989). Accordingly, we find that when speaking of "the courts" and "a judicial body," state courts are included. In our view, a state court may properly interpret federal law using conclusions of a federal agency to aid in determining whether a water is navigable. As the trial court had subject matter jurisdiction related to all issues pertaining to the imposition of the tax pursuant to the Private Act, the trial court properly

concluded that it could determine whether the Ocoee River is a navigable waterway subject to the authority of the United States.[8]

C.

Polk County next argues that MARSEC is not applicable to the activities of commercial whitewater rafting conducted on the Ocoee River. According to the County, a navigable water subject to the authority of the United States under §445 of MARSEC does not include a river like the Ocoee. Polk County raised this argument previously in *High Country*. In that opinion, this court noted as follows:

> Polk County presents no argument as to why the Corps of Engineers' and TVA's definition of "navigable waterway" . . . would not be the appropriate definition[ ] . . . for purposes of the Maritime Act. . . . It is a well-settled rule of statutory construction that "[l]egislative intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language."

2008 WL 4853105, at *11 (citing *Saturn Corp. v. Johnson*, 197 S.W.3d 273, 278 (Tenn. 2006); *Tuggle v. Allright Parking Sys., Inc.*, 922 S.W.2d 105, 107 (Tenn. 1996)). Accordingly, we found in *High Country* that Polk County had failed to support its assertion that the Ocoee is not a "navigable water subject to the authority of the United States" pursuant to MARSEC.

"NAVIGABLE WATER *SUBJECT TO THE AUTHORITY OF THE UNITED STATES*"

Polk County maintains that all arguments made regarding navigability – both in the trial court in the instant matter and to this court in the matter of *High Country* – have focused on "general definitions of what is or what constitutes a navigable water" rather than "focusing on the specific definition of the phrase 'navigable waters *subject to the authority of the United States*.'" In support of this position, Polk County represents that MARSEC does not contain a definition of the term "navigable waters subject to the authority of the United States."

The determination of whether a river is a navigable water of the United States is a question of federal law to be answered according to the legal principles recognized and applied in the federal courts. *United States v. Holt State Bank*, 270 U.S. 49, 55-56, 46 S.Ct. 197, 199 (1926). The question was first addressed by the United States Supreme Court in the case of *The Daniel Ball*, 77

[8] *United States ex rel. Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992 (6th Cir. 1983) comments that the Ocoee River is a "navigable waterway."

U.S. 557 (1870). In determining whether a particular river was a navigable water of the United States, the Court held as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they *are used, or are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Id. at 563 (emphasis added). That original definition provided by the United States Supreme Court sets forth the basic standard of determining navigability that develops and eventually becomes codified by the Code of Federal Regulations in several places: a river is determined to be navigable if it is used or can be made usable for trade or travel.

The legal principles stated above were expanded in *The Montello*, 87 U.S. 430 (1874), in which the United States Supreme Court defined the terms "navigability" and "navigation" to mean a stream's "capability of use by the public for purposes of transportation and commerce," and noted that "the true test of the navigability . . . does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *Id.* at 441.

In *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 403-13 (1940), the following three-pronged test of navigability was announced:

> (1) present use or suitability for use,
> (2) suitability for future use by making reasonable improvements, or
> (3) past use or suitability for past use.

In addition, *Appalachian* reaffirmed that a finding of navigability is inextricably bound with use or susceptibility for use for commercial purposes. 311 U.S. at 416 (use of pleasure boats shows "the availability of the stream for the simpler types of commercial navigation"). The *Appalachian* Court further noted :

> Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.

Id., 311 U.S. at 410 (footnotes omitted).[9]

Polk County relies upon 33 C.F.R. §101.105 as a proper definition of "navigable water subject to the authority of the United States":

> Waters subject to the jurisdiction of the U.S., for purposes of this subchapter, includes all waters described in section 2.36(a) of this chapter; the Exclusive Economic Zone, in respect to the living and non-living resources therein; and in respect to facilities located on the Outer Continental Shelf of the U.S., the waters superjacent thereto.

33 C.F.R. §101.105.[10] Section 2.36(a) of the chapter, as referenced within 33 C.F.R. §101.105, deals with navigable waters of the United States, navigable waters, and territorial waters:

> (a) Except as provided in paragraph (b) of this section, navigable waters of the United States, navigable waters, and territorial waters mean, except where Congress has designated them not to be navigable waters of the United States:
>
> > (1) Territorial seas of the United States;
> > (2) Internal waters of the United States that are subject to tidal influence; and
> > (3) Internal waters of the United States not subject to tidal influence that:
> >
> > > (i) *Are or have been used, or are or have been susceptible for use*, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, or
> > >
> > > (ii) A governmental or non-governmental body, having expertise in waterway improvement, determines to be capable of improvement at a reasonable cost (a favorable balance between the cost and need) to provide, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce.

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[9] There is no need for "navigation [to] be open at all seasons of the year, or at all stages of the water," for a river to be found navigable. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921).

[10] The subject of Title 33 is "Navigation and Navigable Waters." 33 C.F.R. §101.100 provides that Subchapter H of Title 33 is to implement requirements of MARSEC.

33 C.F.R. §2.36(a)(emphasis added). Another definition provided by Polk County of "waters subject to the jurisdiction of the United States" is as follows:

> §2.38 Waters subject to the jurisdiction of the United States; waters over which the United States has jurisdiction mean the following waters –
>
> (a) Navigable waters of the United States, as defined in §2.36(a).
> (b) Waters, other than those under paragraph (a) of this section, that are located on lands for which the United States has acquired title or controls and --
>
> > (1) Has accepted jurisdiction according to 40 U.S.C. §255; or
> > (2) Has retained concurrent or exclusive jurisdiction from the date that the State in which the lands are located entered the Union.
>
> (c) Waters made subject to the jurisdiction of the United States by operation of the international agreements and statutes relating to the former Trust Territory of the Pacific Islands, and Waters within the territories and possessions of the United States.

33 C.F.R. §2.38. Polk County asserts that the Ocoee does not satisfy any of these definitions of navigable waters subject to the authority of the United States.

While 33 C.F.R. §2.36(a) does, in fact, properly define the term "navigable waters subject to the authority of the United States," Moscheo contends that it is not the controlling provision. He argues the controlling regulations are promulgated in part 329 of the Code of Federal Regulations, under the authority of 33 U.S.C. §401, et seq.[11] The purpose of part 329 of the Code of Federal Regulations is as follows:

> This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." . . .

33 C.F.R. §329.1. As this case involves an inquiry concerning a waterway apparently under the jurisdiction of the Corps of Engineers, Moscheo argues the definition of "navigable waters subject to the authority of the United States" found in part 329 of the Code of Federal Regulations is appropriate:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide *and/or are presently used, or have been used in the past, or may be susceptible for use* to transport interstate or foreign commerce. A determination of

[11] The Rivers and Harbors Act of 1899.

> navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. §329.4 (emphasis added).

We find the same conclusion regarding navigability can be reached by applying any of the definitions. The importance of applying the latter definition over the ones proposed by the County, however, is that the Corps of Engineers has been expressly granted authority by Congress to make determinations regarding what constitutes navigable waters under the authority of the United States. *See* 33 U.S.C. §§401, et seq.

C.F.R. §329.14(a) provides that "although conclusive determinations of navigability can be made only by federal courts, those made by federal agencies are nevertheless accorded substantial weight by the courts." Thus, when a court is presented with an issue regarding navigability, the court may give substantial weight to a decision reached by the Corps of Engineers. *See Hartman v. United States*, 522 F.Supp. 114, 117 (D.S.C. 1981). The Corps' determination of navigability should not be rejected unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

In the instant matter, the record reflects that the trial court was provided with substantial evidence to support a conclusion that the Ocoee River is a "navigable water of the United States." In support of his motion for summary judgment, Moscheo submitted a statement of undisputed material facts, supported by the affidavit of Ronald Gatlin, the Chief of the Regulatory Branch for the United States Army Corps of Engineers, Nashville District, which provided in pertinent part as follows:

> The Corps of Engineers, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that the Ocoee River is *a navigable waterway of the United States* from its mouth to mile 38.8, which represents the Tennessee-Georgia state line.

(Emphasis added). Rather than dispute this determination of navigability as set forth by the affidavit and perhaps create a disputed issue regarding a material fact, Polk County agreed that the Corps' determination was undisputed. In fact, the County submitted its own affidavit from Mr. Gatlin, which provided, inter alia, as follows:

> 4. I am the custodian of records of the United States Army Corps of Engineers pertaining to the determination as to whether or not the Ocoee River in Polk County, Tennessee, is a navigable waterway of the United States. Such records include documents utilized pursuant to 33 Code of Federal Regulations 329.14 -- Definition of Navigable Waters of the United States -- Determination of Navigability. Those records are kept under my custody in the ordinary course of business.

> 5. The attached records are those records made and maintained by my office to support the determination that the Ocoee River in Polk County, Tennessee *is a navigable waterway of the United States* from its mouth to mile 38.8, which represents the Tennessee - Georgia state line. . . .

(Emphasis added).

The factors "which must be examined when making a determination whether a waterbody is a navigable water of the United States" are outlined in 33 C.F.R. §329.5. The following conditions must be satisfied:

> (a) Past, present or potential presence of interstate foreign commerce;
> (b) Physical capabilities for use by commerce as in paragraph (a) of this section; and
> (c) Defined geographic limits of the waterbody.

See Stewart v. United States Dep't of Agric., ___ F.Supp. 2d ___, 2009 WL 2046236, at *6 (D. Or. July 13, 2009); *Loving v. Alexander*, 548 F.Supp. 1079, 1091 (W.D. Va. 1982), *aff'd* 745 F.2d 861 (4th Cir. 1984) (Corps asserted regulatory jurisdiction over a river based on its administrative finding of navigability). Interstate or foreign commerce is described as follows:

> Nature of Commerce: type, means, and extent of use. The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in §329.9 of this Part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, *sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period*. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; *transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States*. . . . [T]he logs must have been related to a commercial venture. Similarly, *the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce*, either presently, in the future, or at a past point in time.

33 C.F.R. §329.6(a) (emphasis added).

The documents that are referenced in the affidavit of Mr. Gatlin set forth the basis of the Corps of Engineers' determination that the Ocoee River is in fact a "navigable water of the United States." Specifically, those reports establish that while "[n]o interstate commerce exists at present [, e]vidence of historical records unquestionably indicates that the Ocoee River was navigated by

a substantial interstate commerce of agricultural commodities . . . , shipments of copper ore mined in the extreme southeastern corner of Tennessee, and by a traffic in floated forest products . . . ." According to the reports, the Ocoee was "long considered as a canal route from the Tennessee Valley Region through the divide to the Conasauga River in Georgia which flowed through Georgia and Alabama to the Gulf of Mexico." The reports further set forth, under the heading, "Present Potential Use for Interstate Commerce," that the "impoundments, particularly Ocoee No. 1 pool and Blue Ridge Lake, are capable of supporting commercial navigation (towboat and barges) but navigation presently consists of use by recreational craft." The reports additionally note:

> b. While navigation on Ocoee River is limited at present to the use of recreational craft, the regulation of activities on the stream as a navigable water of the United States would be in accordance with the increasing recognition by both Congress and the courts of the commerce-related nature of recreational activities occurring on many smaller waterways. . . .
>
> c. Though the United States has not exercised jurisdiction over Ocoee River as a navigable water of the United States, . . . the [Corps] never relinquished its responsibilities for the protection of Ocoee River as a navigable water of the United States. . . .

The "Opinion of District Counsel" reflects that "there are specific areas within the recommended limits where it would be difficult to establish navigability[, h]owever, repeated segmentation of the stream into navigable and non-navigable areas is considered neither practical nor consonant with the principles enunciated in the case law." Comments by District Counsel regarding the use of the stream by canoeists "indicates its availability, both presently and in the past, for the simpler types of commercial traffic[,]" and that "[i]t is this capability which is important rather than the manner and extent of the use."

Upon these determinations, along with others, the Division Engineer of the Army Corps of Engineers at the time, Brigadier General E.R. Heiberg, III, expressly set forth his recommendation that the Ocoee River be given an "official determination of navigability to mile point 83.8."

Considering the fact that the County did not dispute that the Corps of Engineers was authorized to make and did in fact make a determination of navigability based upon past, present and/or potential future use for navigation, and in view of the fact that Polk County actually made a part of the record documents that support this determination, it cannot be maintained that the issue of whether the Ocoee River had been determined to be navigable was a disputed fact for purposes of summary judgment. The only proof in the record is that the Ocoee is navigable. As such, the trial court did not err when it relied upon those facts in the record to make a determination that the Ocoee River is a navigable waterway of the United States for purposes of 33 U.S.C. §5(b).

D.

Moscheo asks this court to affirm the trial court's finding that the federal legislation preempts the Private Act authorizing Polk County to levy the Privilege Tax. The County submits that MARSEC does not preempt the Private Act. In support of its position, Polk County proffers two arguments: (1) absent express language in the Act, courts should be reluctant to infer preemption and (2) the legislative history of MARSEC does not support preemption.

Polk County argues that the purpose and intent of MARSEC was to establish a program to ensure greater security for seaports. The County notes that there are no express references in the Act to rivers like the Ocoee that do not contain a port or harbor or to activities such as whitewater rafting.

There is support for Polk County's argument regarding MARSEC. Case law has held that the Act was enacted to detect and deter a potential "transportation security incident," which Congress defined as a "security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." 46 U.S.C. §70101(6). *See Cassidy v. Chertoff*, 471 F.3d 67, 82-83 (2nd Cir. 2006) (providing comprehensive discussion of MARSEC, 46 U.S.C. §§70101-70119, by then Circuit Judge Sonia Sotomayor). Such an occurrence seems unimaginable on the Ocoee River. Further, the Congressional findings regarding Pub. L. 107-295, Title I, §101, Nov. 25, 2002, 116 Stat. 2066 provided that:

> The Congress makes the following findings:
>
> (1) There are 361 public ports in the United States that are an integral part of our Nation's commerce.
>
> (2) United States ports handle over 95 percent of United States overseas trade. The total volume of goods imported and exported through ports is expected to more than double over the next 20 years.
>
> (3) The variety of trade and commerce carried out at ports includes bulk cargo, containerized cargo, passenger transport and tourism, and intermodal transportation systems that are complex to secure.
>
> (4) The United States is increasingly dependent on imported energy for a substantial share of its energy supply, and a disruption of that share of supply would seriously harm consumers and our economy.
>
> (5) The top 50 ports in the United States account for about 90 percent of all the cargo tonnage. Twenty-five United States ports account for 98 percent of all container shipments. Cruise ships visiting foreign destinations embark from at least 16 ports. Ferries in the United States transport 113,000,000 passengers and 32,000,000 vehicles per year.

(6) Ports often are a major locus of Federal crime, including drug trafficking, cargo theft, and smuggling of contraband and aliens.

(7) Ports are often very open and exposed and are susceptible to large scale acts of terrorism that could cause a large loss of life or economic disruption.

* * *

(9) The cruise ship industry poses a special risk from a security perspective.

(10) Securing entry points and other areas of port facilities and examining or inspecting containers would increase security at United States ports.

* * *

(12) United States ports are international boundaries that –

(A) are particularly vulnerable to breaches in security;

(B) may present weaknesses in the ability of the United States to realize its national security objectives; and

(C) may serve as a vector or target for terrorist attacks aimed at the United States.

(13) It is in the best interests of the United States –

(A) to have a free flow of interstate and foreign commerce and to ensure the efficient movement of cargo;

(B) to increase United States port security by establishing improving communication among law enforcement officials responsible for port security;

(C) to formulate requirements for physical port security, recognizing the different characters and nature of United States port facilities, and to require the establishment of security programs at port facilities;

(D) to provide financial assistance to help the States and the private sector to increase physical security of United States ports;

> (E) to invest in long-term technology to facilitate the private sector development of technology that will assist in the nonintrusive timely detection of crime or potential crime at United States ports;
>
> (F) to increase intelligence collection on cargo and intermodal movements to address areas of potential threat to safety and security; and
>
> (G) to promote private sector procedures that provide for in-transit visibility and support law enforcement efforts directed at managing the security risks of cargo shipments.
>
> * * *

46 U.S.C. §70101. Nothing contained in these findings seems to relate to white water rafting on the Ocoee.

In *Cassidy*, however, we see a situation more similar to the matter before us. The plaintiffs in that case contended that even if the government had a "special need" pursuant to MARSEC to protect large ferries in major metropolitan areas, it did not have to protect ferries on Lake Champlain, where there is no obvious terrorist threat. 711 F.3d at 83. The Second Circuit rejected this assertion:

> Although the plaintiffs may be correct that Lake Champlain ferries are a less obvious terrorist target than ferries are in, for example, New York City or Los Angeles, the airline cases make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism in order to implement a nationwide security policy . . . .

Id. We agree with the reasoning of this holding. While the Ocoee River seems to be a remote terror target, the federal government is not required to demonstrate how every navigable waterway subject to its authority might be subjected to acts of terrorism in order to implement its nationwide security policy.

As to the underlying prohibition on taxation in the federal provision, we note that the *State Tonnage Tax Cases*, 79 U.S. 204 (1870), recognized that a state might levy taxes upon ships and vessels owned by citizens of the state "*as property, based on a valuation of the same* as property" but went on to state that

> it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying *any duty of tonnage*, without the consent of

> Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State. . . .

79 U.S. at 213-14 (emphasis in original). The United States Supreme Court has also recognized that the prohibition against tonnage duties includes "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge" for the plying on navigable waters. *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 265-66 (1935). The Court added that a tax prohibition does not extend to charges made by a state authority for "*services rendered to and enjoyed by the vessel*," such as pilotage, wharfage, or, as in that case, a charge levied to cover the cost of policing a harbor so as to ensure the safety and movement of vessels. 296 U.S. at 266-67 (emphasis added). The exception noted in 33 U.S.C. §5(b)(2) tracks this language. Clearly, the United States Supreme Court has always steadfastly refused to validate taxes imposed upon any vessel, whether measured by tonnage or any other device, for the mere use of navigable waters. In our view, Polk County's tax, in its current form, is specifically prohibited by the Constitution of the United States as well as by congressional statute. *See* U.S. Const., art. 1, §10, cl. 3 (prohibiting duty of tonnage) and U.S. Const., art. 1, §8, cl.3 (Commerce Clause).

The Supremacy Clause of the United States Constitution is applicable in this matter as well. That clause clearly and expressly sets forth that the federal law is the supreme law of the land, ". . . and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." *See* U.S. Const. art. VI, cl. 2. It is a well-established principle that the Supremacy Clause invalidates state laws that "interfere with, or are contrary to . . ." federal law. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)). State law is nullified to the extent that it actually conflicts with a federal law. *Id.* at 713.

The power to exercise control over and to regulate the navigable waterways of the United States rests squarely with Congress. *See Gibson v. United States*, 166 U.S. 269, 272-75 (1897) (holding that all navigable waters are under control of United States for purpose of regulating and improving navigation); *Leovy v. United States*, 177 U.S. 621, 632 (1900) (finding that the power of Congress to regulate navigable waters, while not expressly granted in the Constitution, "is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes'"). (quoting U.S. Const., art.1, §8, cl.3). When faced with a state and/or local statute that conflicts with an express mandate from Congress, a court must determine if preemption applies.

"[W]here there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter." *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 32-33 (1996) (citing *Waite v. Dowley*, 94 U.S. 527, 533 (1876)). In such a situation, federal law preempts the state or local law because Congress intends for federal law to provide the sole authority on such matters.

Based upon the extensive federal statutory and regulatory scheme affecting navigable waterways, and based upon the clear mandate in the Act providing that "No taxes . . . shall be levied upon or collected from . . ." vessels or water craft or from passengers or crew on a navigable waterway, we find that the trial court correctly determined that 33 U.S.C. §5(b) preempted the 2001 Private Act.

We also note that direct conflict preemption arises when federal law is in "irreconcilable conflict" with the state or local law. *See Barnett Bank*, 517 U.S. at 31 (citing *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982)). Where compliance with both statutes is a "physical impossibility," although the federal statute does not expressly state that it preempts the state or local statute, the federal statute is nevertheless considered to preempt the local or state statute. *Id.,* 517 U.S. at 31.

In the *High Country* opinion, this court found as follows as to this issue:

> It is beyond dispute that there is a manifest conflict between Polk County's local privilege tax which levies a tax on a consumer participating in rafting excursions on navigable waterways in the county and requires collection of the tax by the operator of such excursion, and [33] U.S.C. 5(b), which prohibits the levying and collection of a tax from any vessel or water craft operating on any navigable waters subject to the authority of the United States or from its passengers or crew. The conflict is "irreconcilable," and compliance with both laws is "a physical impossibility."

2008 WL 4853105 at *13. The *High Country* opinion further notes:

> [W]e believe that the obvious and inescapable conflict between the local tax and the federal prohibition overcomes the assumption against [preemption]. Further, we find nothing in the federal legislation that shows it to be a prohibition of prospective state legislation only, and we find no reasonable basis for construing it to be so limited.

Id.

Having previously ruled that the Private Act was preempted by 33 U.S.C. §5(b), and in light of the fact that Polk County has submitted no legal authority to support a reversal of that ruling, we find that based upon the inescapable conflict between the Private Act and 33 U.S.C. §5(b), the Private Act is preempted by 33 U.S.C. §5(b).

V. CONCLUSION

Based on the evidence in the record, the Ocoee is clearly a navigable waterway subject to the authority of the United States. Polk County is therefore prevented from collecting the tax unless criteria in 33 U.S.C. §5(b)(2) are met. Thus, "[n]o taxes . . . shall be levied upon or collected . . . except for . . . reasonable fees . . . that (A) are used *solely* to pay the cost of a service to the vessel

or watercraft; . . ." (Emphasis added.) The County admitted to the trial court that the proceeds have not been used *solely* to "pay the cost of a service to the vessel or watercraft. . . ." As Polk County's use of the tax has been as a general revenue measure, the County failed to meet the statutory exceptions outlined in 33 U.S.C. §§5(b)(2). Thus, the tax is in violation of federal law and is void.

The undisputed facts in this case support only one conclusion. Accordingly, the judgment of the trial court awarding summary judgment to Moscheo is affirmed. Costs on appeal are taxed to the Appellant, Polk County. This case is remanded to the trial court for further proceedings, pursuant to applicable law.

_____

JOHN W. McCLARTY, JUDGE